IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: LOCAL TV ADVERTISING ANTITRUST LITIGATION	MDL No. 2867 No. 18 C 6785
This Document Relates to All Actions	Honorable Virginia M. Kendall

JOINT STATUS REPORT IN RESPONSE TO THE COURT'S NOVEMBER 2, 2018 ORDER

A. The Nature of the Claims

Plaintiffs' Position

On July 26, 2018, reports surfaced that the United States Department of Justice was investigating whether defendants Sinclair Broadcast Group, Inc. and Tribune Media Co., and other unidentified local television station owners were manipulating the price of television advertising. After the July 26 report, class actions were filed alleging an unlawful conspiracy among some or all of Defendants Sinclair Broadcast Group, Inc., Tribune Media Co., Gray Television, Inc., Hearst Television Inc., Nexstar Media Group., Inc., and Tegna Inc. to fix the prices of local spot advertising in various Designated Market Areas ("DMAs"), in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. One complaint, *John O'Neil Johnson Toyota, LLC v. Gray Television, Inc.*, No.1:18-cv-2913 (D. Md.), alleges violations of various state antitrust, consumer protection, and unjust enrichment laws. This Status Report represents the consensus of the plaintiffs in all actions. Collectively, all actions are referred to as the "Consolidated Actions." A list of all filed actions is attached as Appendix A.

The Consolidated Actions generally allege that Defendants artificially inflated the price of local television advertising spots from at least January 1, 2014, through the present, including by sharing confidential information with each other. This week, six broadcast TV companies including Sinclair Broadcast Group and Tribune Media agreed to settle a civil antitrust suit filed by the U.S. Department of Justice accusing them of illegally sharing competitively sensitive information.[1]

Defendants' Position

Defendants deny the allegations and all liability to Plaintiffs. Plaintiffs' complaints—which are based on nothing more than a vague news report—fail to meet the pleading standards set by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Among other things, the complaints do not allege a plausible conspiracy among Defendants, any anticompetitive effects from the allegedly unlawful conduct, or facts demonstrating antitrust injury or antitrust standing. Plaintiffs' reference to the DOJ's investigation and related consent decrees only confirms the deficiency of their allegations. The DOJ took no testimony, the settlements certain

[1] https://www.justice.gov/atr/case/us-v-sinclair-broadcast-group-inc-et-al

Defendants entered into were without any admission of fault or wrongdoing, and no penalties were sought or imposed. There are no allegations much less concessions of any sort of improper pricing conduct.[2]

B. Pending Motions, Including Matters before the Judicial Panel on Multidistrict Litigation ("JPML")

1. Identify All Pending Motions.

Aside from motions for leave to appear *pro hac vice*, the parties are not aware of any motions pending before the Court.

2. Motions Pending before the JPML

The parties are not aware of any motions pending before the JPML.

C. Consolidated Complaint

Direct Purchaser Plaintiffs' Position

Because some Plaintiffs assert claims only under federal antitrust laws while others also assert damage claims under state antitrust laws, separate consolidated class action complaints for the Plaintiffs who are asserting federal claims only and the Plaintiffs who are also asserting state claims would be appropriate. Plaintiffs propose that Consolidated Class Action Complaints be filed within 45 days after the appointment of interim lead counsel by the Court.

Position of Plaintiffs with Indirect Purchaser Claims

Plaintiffs asserting indirect purchaser claims in addition to federal law claims agree to the filing of separate Consolidated Complaints for entities asserting additional indirect purchaser claims and entities asserting only direct purchaser claims.

Defendants' Position

Plaintiffs' antitrust and state law claims should be included in a single consolidated complaint, as is common practice in MDLs and elsewhere, except to the extent those claims are being asserted on behalf of separate proposed classes of direct and indirect purchasers. Plaintiffs' position that they will file two consolidated complaints otherwise undermines the efficiency of the MDL process and serves no legitimate purpose, as it would result in two parallel actions in which they would be pursuing the same federal claims on behalf of the same putative classes.

D. Answers or Rule 12(b) Motions.

1. Answers

Answers to at least one of the Consolidated Actions were filed prior to the JPML's ruling.[3]

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[2] Defendants reserve the right to assert additional defenses and counterclaims to Plaintiffs' vague allegations and/or any new allegations contained in any amended complaint.

[3] *See Dozier Law Firm LLC v. Gray Television, Inc., et al.*, Case No. 1:18-cv-5392 (N.D. Ill.) (Answers filed by Gray Television, Inc., Hearst Communications, Nexstar Media Group, Inc., and Tegna Inc.).

2. *Answers or Rule 12(b) Motions to the Consolidated Amended Complaints*

The parties agree that if motions to dismiss under Federal Rule of Civil Procedure 12(b) are filed, they should proceed on the following schedule:

i. Motions to Dismiss to be filed 60 calendar days from the date upon which Plaintiffs file their consolidated complaint(s).

ii. Oppositions to Motion(s) to Dismiss to be filed within 60 calendar days from the date when Defendants file their Motion(s) to Dismiss; and

iii. Replies to be filed 30 calendar days from the date when Plaintiffs file their Oppositions.

E. Discovery Plan, Including Anticipated Electronic Discovery

1. DOJ Document Discovery

Plaintiffs' Position

Discovery has not commenced in any of the Consolidated Actions. Plaintiffs do not seek to initiate discovery until the Court appoints interim lead counsel, as discussed below; however, Plaintiffs intend to seek immediate production of all documents produced by Defendants to the Department of Justice in connection with its investigation, and believe production should be ordered to occur in time to allow for those documents to be examined prior to filing of Consolidated Class Action Complaints.

Defendants argue that they should not have to produce the documents they previously produced to the DOJ. This issue has arisen repeatedly in antitrust litigation, and in the absence of a request by DOJ to stay or limit production, the vast majority of courts have ordered that the documents be produced. *See, e.g,* In re Broiler Chicken Antitrust Litig., No. 1:16-cv-08637, 2017 WL 4322823, at *3-4 (N.D. Ill. Sept. 28, 2017); In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 1:09-cv-03690 (ECF No. 75) (N.D. Ill. Mar. 4, 2010). In *In re Lithium Ion Batteries Antitrust Litig.,* No. 13-md-02420 (N.D. Cal.)[4] the Court rejected the very argument made by defendants here and in response to defendants' argument that an early production of DOJ documents was unusual said, "Well, not according to all the district judges I spoke to at the last MDL conference . . .." August 8, 2014 Tr., 13-md-02420- ECF No. 502 at 82:25-83:2. Plaintiffs believe that argument regarding the merits of this dispute is inappropriate for purposes of this submission, and respectfully request the opportunity to fully brief this issue after the appointment of interim lead counsel.

Defendants' Position

No discovery, including of documents produced to the DOJ, should go forward until the Court has the opportunity to assess whether Plaintiffs are able to plead a viable antitrust claim. *See Twombly*, 550 U.S. 554. The complaints currently on file contain nothing more than bare assertions of a conspiracy, with no allegations of fact to support their claims. While Plaintiffs have said they intend to file at least one consolidated complaint, they should not be afforded pre-complaint (and one-sided) discovery of Defendants to figure out *whether* they can allege an antitrust violation.

[4] Relevant excerpts are attached as Appendix B.

The mere fact that some Defendants provided documents to the government "'does not mean that everyone else has an equal right to rummage through the same records.'" *Nexstar Broad., Inc. v. Granite Broad. Corp.*, 2011 WL 4345432, at *4 (N.D. Ind. Sept. 15, 2011) (quoting *In re Graphics Processing Units Antitrust Litig.*, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007)). As an initial matter, with no operative complaint filed, Plaintiffs' allegations are largely unknown, making it impractical if not impossible for Defendants at this stage to try to determine which documents produced to DOJ are responsive to Plaintiffs' allegations. The process of re-reviewing and re-producing in this circumstance would impose a substantial and unwarranted burden—and one that would fall entirely on the shoulders of Defendants. That problem is exacerbated by Plaintiffs' ill-defined reference to the DOJ's "investigation." Tribune, for example, produced over ***3 million documents*** to DOJ in connection with the potential merger between Tribune and Sinclair. Most of those documents have nothing to do with the issues presented here, and to the extent some potentially do, they have not been segregated or identified as such. Furthermore, in addition to re-reviewing for relevance and privilege, Defendants would need to review their productions for competitively sensitive information before making any documents available to Plaintiffs and to their co-Defendants (who are also among their primary competitors in certain markets).

Courts in this Circuit and elsewhere have cited similar burdens when staying the production of documents previously provided to the government pending the resolution of a motion to dismiss. *Nexstar*, 2011 WL 4345432, at *4; *see also In re: Pre-Filled Propane Tank Antitrust Litig.*, 2015 WL 11022887, at *3 (W.D. Mo. Feb. 24, 2015) (granting defendants' motion for stay of discovery in antitrust litigation, including a stay on production of documents previously produced to the FTC in a related investigation); *Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P.*, 2008 WL 8465061, at *1 (S.D. Tex. Aug. 11, 2008) (granting defendants' motion for a stay of discovery in antitrust litigation, including a stay of documents previously produced to governmental agencies, because defendants' "need to review such a large volume of documents prior to producing them would be a significant burden"); *In re GPU*, 2007 WL 2127577, at *5 (granting defendants' motion to stay discovery in multidistrict antitrust litigation, including production of documents previously produced to the SEC, pending court's resolution of motion to dismiss).

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' request for "immediate" discovery of documents previously produced to DOJ. If the Court is inclined to grant Plaintiffs' request, or to allow any other discovery to proceed prior to a ruling on motions to dismiss, Defendants request an opportunity to fully brief the issue and to further articulate the production burden they would face. The parties agree that this issue should be the subject of full briefing and motion practice.

2. *Discovery Schedule*

Plaintiffs proposed that to maximize efficiency, a discovery schedule should be set after the Court appoints interim lead counsel. Defendants agree. The Manual for Complex Litigation provides that Plaintiff's Lead Counsel shall be responsible for coordinating pretrial activities of plaintiffs, including "working with opposing counsel in developing and implementing a litigation plan," determining and presenting the plaintiffs' position "on all matters arising during pretrial proceedings" and "coordinat[ing] the initiation and conduct of discovery on behalf of plaintiffs[.]" *Manual for Complex Litigation, Fourth* §§ 10.221, 10.222 and 40.22 (2004). After this Court appoints interim lead counsel, the parties should propose a comprehensive discovery

schedule, including both fact and expert discovery. Following the leadership appointment, the parties should also meet and confer about the exchange of relevant information prior to the commencement of discovery, including the identity of custodians and other sources of relevant information.

3. Preservation of Evidence

The parties do not believe an order directing the preservation of evidence is necessary at this time. The parties do intend to address preservation issues as part of the negotiations of an Electronic Discovery Protocol.

4. Electronic Discovery

In accordance with the Federal Rules of Civil Procedure, the parties intend to meet and confer with the intention of filing a proposed Electronically Stored Information ("ESI") Protocol within 30 calendar days after the filing of the consolidated complaint(s).

5. Confidentiality Order

Plaintiffs' Position

Plaintiffs believe that it will be most efficient to negotiate the Confidentiality Order after appointment of Lead Counsel and therefore propose filing a proposed, agreed-upon confidentiality order within 21 calendar days of the Court's leadership appointments, or if agreement cannot be reached will submit the matter to the Court for resolution.

Defendants' Position

Defendants are willing to work with Plaintiffs to file a proposed, agreed-upon confidentiality order by the December 14, 2018 deadline set by the Court. As set forth above, no discovery should occur prior to resolution of motions to dismiss; however, in no event should any document production be required until an agreed-upon confidentiality order is entered.

6. Status of Settlement Discussions

No settlement discussions have occurred to date. The parties believe that it is premature to request a settlement conference before lead counsel is appointed.

7. Tag along cases

The Consolidated Actions are identified in the attached Appendix A. The parties will timely notify the Court of any additional tag-along cases.

8. Management Issues

The parties do not anticipate any other management issues for the Court to address at this time.

Dated: November 16, 2018

Respectfully submitted,

/s/ Robert S. Kitchenoff

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